RHB BANK BHD

v.

PEMBINAAN MCP SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[COMPANIES (WINDING-UP) NO. MT1-28-24-2002]
11 DECEMBER 2002

COMPANY LAW: *Winding-up - Opposition to petition - Petition based on summary judgment - Whether notice of appeal against summary judgment could affect validity of judgment - Whether such appeal should not operate as a stay regardless of merits of appeal - Whether a bona fide disputed debt existed - Whether judgment debtor's failure to file purported counterclaim rendered it irrelevant - Whether judgment debtor insolvent - Rules of the High Court 1980, O. 55 r. 12 - Companies Act 1965, s. 218(1)(e), (2)(a)*

This was a petition by the petitioner, a judgment creditor ('JC'), pursuant to s. 218(1)(e) of the Companies Act 1965 ('the Act'), against the respondent, a judgment debtor ('JD'), on the basis of a summary judgment obtained by the JC against the JD in the sessions court. The JD objected to the petition, submitting that: (1) there were merits in the JD's appeal against the summary judgment and that the court could allow evidence to be adduced to decide whether there was a *bona fide* dispute; (2) the JD had a counterclaim against the JC which exceeded the judgment sum in the summary judgment; and (3) the existence of two supporting creditors did not show the JD's insolvency. The JC, however, submitted that the JD had failed to comply with the notice under s. 218 of the Act as the JD had neither satisfied the summary judgment nor obtained a stay of execution thereof, and that the JD's appeal should not operate as a stay, notwithstanding the JD's belief that the appeal would be successful. The JC also added that there was no *bona fide* disputed debt and that since the JD's counterclaim had yet to be filed, it was irrelevant to the petition herein; the JC and supporting creditors also submitted that the JD was insolvent.

Held:

[1] A judgment, be it a judgment in default, summary judgment or a judgment obtained after a full hearing, was nonetheless a good, enforceable and valid judgment unless and until it was set aside, or execution thereof had been stayed. A mere notice of appeal against any such judgment could not alter the validity of the judgment so obtained. In the instant petition, there was no attempt by the JD to apply for a stay of the execution of the summary

judgment. Notwithstanding the appeal by the JD against the summary judgment, it was axiomatic that such an appeal should not operate as a stay by virtue of O. 55 r. 12 of the Rules of the High Court 1980. (pp 341 e & 342 a-c)

[2] As the JD's purported counterclaim had yet to be filed, it was a bare allegation which was illusory and was therefore irrelevant to the instant petition. It remained an uncertainty whether the counterclaim would see the light or find itself as part of the process or proceeding in court, and even if it were to be filed eventually, it had to go through the process of litigation before it could eventually graduate into a judgment. (p 343 f)

[3] It was an established fact that the JD had not shown any evidence of its solvency, and in addition to the JC, there were two supporting creditors, thereby cumulatively providing overwhelming evidence of the JD's commercial and actual insolvency. (p 344 f)

[Petition allowed.]

Case(s) referred to:

Banfoong Sydney (JM) Sdn Bhd v. MIFC Credit & Leasing Sdn Bhd [1990] 2 MLJ 120 HC ***(refd)***

Bank Pembangunan (M) Bhd v. Elgi Marka Sdn Bhd [1998] 5 MLJ 504 HC ***(refd)***

Bank Utama (Malaysia) Bhd v. GKM Amal Bhd [2000] 2 CLJ 525 HC ***(foll)***

BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd [2001] 1 CLJ 356 HC ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC ***(refd)***

Chong Chee Yan v. Golden Dragon Garden Sdn Bhd [1999] 3 CLJ 151 HC ***(refd)***

Constrajaya Sdn Bhd v. Johore Coastal Development Sdn Bhd [2002] 6 CLJ 92 HC ***(refd)***

Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 CA ***(refd)***

Datuk Mohd Sari Datuk Nuar v. Idris Hydraulic (Malaysia) Berhad [1996] 3 CLJ 877 HC ***(refd)***

Hang Chiang Hwa v. Tong Chang Fook (Melaka High Court 29-29-2001) HC ***(foll)***

Imbangan Utama Sdn Bhd v. Lothan Engineering Works Sdn Bhd [2002] 3 AMR 2647 HC ***(refd)***

Mahkota Technologies Sdn Bhd v. BS Civil Engineering Sdn Bhd [2000] 7 CLJ 280 HC ***(refd)***

Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451 HC ***(refd)***

Natseven TV Sdn Bhd v. Television New Zealand Ltd [2001] 4 CLJ 722 HC ***(refd)***

Ng Tai Tuan & Anor v. Chng Gim Huat Pte Ltd [1991] 1 MLJ 338 HC ***(refd)***

Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC ***(foll)***

Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 MLJ 157 HC ***(refd)***

PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd [1998] 4 CLJ 437 HC ***(refd)***
Re Hong Huat Realty (M) Sdn Bhd; United Asian Bank Bhd v. Hong Huat Realty (M) Sdn Bhd [1987] 2 MLJ 502 HC ***(refd)***
Re Welsh Brick Industries Ltd [1946] 2 All ER 197 ***(refd)***
SBSK Plantations Sdn Bhd v. Dynasty Rangers (M) Sdn Bhd [2002] 2 CLJ 329 HC ***(refd)***
Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd [1985] 1 MLJ 84 ***(refd)***
Solid Kitchen Sdn Bhd v. Regal Development Sdn Bhd [1998] 3 CLJ Supp 409 HC ***(refd)***
Sungei Rinching Sdn Bhd v. Sri Keluarga Sdn Bhd [1996] 3 CLJ 44 CA ***(refd)***
Viking Consultants Pte Ltd v. Syarikat Jaya Utara Construction (Kedah) Sdn Bhd [1990] 1 CLJ 573 HC ***(refd)***
YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd [1996] 3 CLJ 51 CA ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(e), (2)(a)
Rules of the High Court 1980, O. 55 r. 12

Other source(s) referred to:
Walter Woon, *Company Law,* 2nd edn, p 666

For the judgment creditor - Sheena Sinnapah; M/s Ho & Co
For the judgment debtor - Zul Hasmi; M/s Idris & Partners,
For the supporting creditors - SL Ong; M/s Cheee Siah Le Kee & Partners,
For the official receiver - Fital Ahmad, Department Official Assignee

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Petition

This is a petition in encl. (1) presented by the petitioner a judgment creditor ("JC") pursuant to s. 218(1)(e) of the Companies Act 1965 ("the Act") against the respondent, a judgment debtor ("JD") on the basis of a summary judgment obtained by the JC against the JD in Melaka Sessions Court S(2)52-353-2001 on 25 February 2002 in the sum of RM70,484.70 as at 31 January 2001 together with interest at 3.5% p.a. and base lending rate at 6.8% p.a. at monthly rests from 1 February 2001 until full settlement under the facility of bankers acceptance, and costs RM2015 ("the summary judgment").

A reference to a section hereinafter shall, unless the context otherwise requires, be a reference to that section in the Act.

JD'S Grounds Of Objection

The petition was vehemently objected to by the JD, on three grounds.

First, it was submitted by Encik Zul Hasmi learned counsel for the JD that the JD has *bona fide* disputed the summary judgment in that the JC has disbursed or released the money in fixed deposits which the JD has pledged by way of security for the facility granted by the JC to the JD. It was also contended for the JD that there are merits in the JD's appeal against the summary judgment and that in this respect the court can allow evidence to be adduced to decide whether there is a *bona fide* dispute, relying on *Chong Chee Yan v. Golden Dragon Garden Sdn Bhd* [1999] 3 CLJ 151 HC; *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC; *Datuk Mohd Sari Datuk Nuar v. Idris Hydraulic (Malaysia) Berhad* [1996] 3 CLJ 877 HC; *Viking Consultants Pte Ltd v. Syarikat Jaya Utara Construction (Kedah) Sdn Bhd* [1990] 1 CLJ 573 HC; *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 CA; *Banfoong Sydney (JM) Sdn Bhd v. MIFC Credit & Leasing Sdn Bhd* [1990] 2 MLJ 120 HC; *Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd* [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451 HC; *Solid Kitchen Sdn Bhd v. Regal Development Sdn Bhd* [1998] 3 CLJ Supp 409 HC; *Constrajaya Sdn Bhd v. Johore Coastal Development Sdn Bhd* [2002] 6 CLJ 92 HC; *Ng Tai Tuan & Anor v. Chng Gim Huat Pte Ltd* [1991] 1 MLJ 338 S'pore HC.

The second ground is that the JD purportedly has a counterclaim against the JC which exceeds the judgment sum in the summary judgment. I have used the word "purportedly" because the JD has yet to file the "counterclaim".

The JD's third and final ground is that the existence of two supporting creditors *viz* Hong Leong Bank Bhd and United Overseas Bank (M) Bhd ("the supporting creditors") do not show the JD's insolvency.

Response By JC

Cik Sheena M Sinnappah, learned counsel for the JC, submitted that the JD has not complied with the notice under s. 218 as the JD has neither satisfied the summary judgment nor obtained a stay of execution thereof, and that the JD's appeal against the summary judgment shall not operate as a stay, notwithstanding the JD's belief that the appeal would be successful.

Learned counsel added that there is no *bona fide* disputed debt and that since the JD's counterclaim has yet to be filed, it is irrelevant to the petition herein. It was contended for the JC that the JD's insolvency is not doubted as the supporting creditors represented by learned counsel Cik SL Ong revealed that the extent of the outstanding debt due to them exceeded RM1.5 million. In a nutshell, both the learned counsel for the JC and the supporting creditors submitted that the JD is insolvent.

Decision Of The Court

Consideration Of Authorities Cited For JD

In the light of the numerous authorities cited for the JD and in deference to the inexhaustible initiative and effort demonstrated and expended by the JD's learned counsel, I shall proceed to deal with them for the purpose of arriving at a determination on the relevance, support or assistance which the JD may derive therefrom.

It is imperative to state the fact which is of central and critical importance to this petition ie, the summary judgment against the JD which has not been stayed.

The facts in *Chong Chee Yan, supra,* (which concerned the commencement of a winding-up petition) cited for the JD were in relation to numerous agreements which were hotly disputed by the respondents. There was not an iota of evidence to the effect that the petitioner has obtained any judgment against the respondent. The facts were entirely out of focus and have no bearing with or relevance to the facts of the petition before me.

The other authorities relied on by the JD such as *Chip Yew Brick Works, supra, Datuk Mohd Sari, supra, Viking Consultants, supra, Re Welsh Brick Industries, supra,* which was cited in *Chip Yew Brick Works, supra,* also share a common denominator in that the facts therein do not seem to show any judgment having been obtained by the petitioner against the respondent in the petition for winding-up. In my view, none of these cases can be considered as constituting sources of support for or assistance to the JD's contention.

I shall now consider yet another set of cases which the JD is apparently seeking support.

The first of such cases is *Banfoong Sydney, supra,* which concerned a judgment in default having been obtained against the debtor. The debtor's application to set aside the judgment and for stay thereof had been dismissed, and consequently the debtor's application to restrain the creditor from instituting proceedings to wind up the debtor was dismissed by Zakaria Yatim, J (later FCJ), as the debt was no longer a disputed debt. This authority, instead of strengthening the JD's submission, is indeed supportive of the JC's petition herein.

The next case is *Mark Jaya, supra,* wherein the facts showed that the default judgment which the petitioner has obtained against the respondent has been set aside, in which case the debt was no longer a judgment sum but a disputed debt and hence Abu Mansor, J (later FCJ) dismissed the petition for winding-up.

Then came the case of *Solid Kitchen*, *supra*, where the petitioner had obtained judgment against the respondent in the sessions court, against which there was an appeal and application for stay, both of which were pending disposal. KL Rekhraj, J (as he then was) held that the debt on a judgment subject to appeal is not an undisputed debt, and allowed a stay of all further winding-up proceedings. It is to be noted that the winding-up petition was not dismissed. I shall revert to this case later in my judgment herein.

The fourth case is *Constrajaya Sdn Bhd*, *supra*, where a winding-up petition was presented by the petitioning creditor based on a judgment in which a stay of execution has been granted to the respondent pending appeal to the Court of Appeal. Zulkefli Ahmad Makinudin, J referred to *Solid Kitchen*, *supra*, in respect of the disputed debt and held that in view of the stay of execution, the petitioner has lost the right to continue or maintain the winding-up petition against the respondent.

In the Singapore case of *Ng Tai Tuan*, *supra*, the creditor petitioned for the winding-up of the respondent pursuant to two judgments. However, the respondent's counterclaim against the petitioner was for an amount very much exceeding the debt owed by the respondent to the petitioner. The counterclaim has been filed by the respondent and was pending hearing in the courts and so Chao Hick Tin JC (now J) ordered a stay of the winding-up petition. The facts are clearly not on all fours with those in the instant petition.

It is obvious to me that none of the aforesaid authorities can properly be followed as the foundation to support the JD's contention as the facts are entirely different from those in the instant petition and would indeed militate against the JD's objections to the winding-up petition.

JD'S Burden Of Proof

The JC's petition is undoubtedly founded on the JD's inability to pay under s. 218(1)(e) read with s. 218(2)(a) of the Act which were enacted in the following words:

> (e) the company is unable to pay its debts;"
>
> (2) A company shall be deemed to be unable to pay its debts if -
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

The facts of the case show that the JC has clearly complied with s. 218(1)(e) and as the judgment sum far exceeded RM500, under s. 218(2)(a) the JD is presumed to be unable to pay its debts. This presumption is a rebuttable presumption, in which case, the burden of proof is shifted to the JD to establish its ability to pay the judgment sum, interest accrued and costs.

With respect I agree with learned author Walter Woon who in his book *"Company Law"* 2nd edn at p. 666 observed that if a creditor obtains a judgment against a company and the judgment debt is not paid, the company will be deemed to be insolvent unless it can show otherwise and it will be very difficult (if not impossible) to rebut the presumption of insolvency since there are no grounds on which a company could justifiably refuse to pay a properly obtained judgment debt.

In my view, a debtor must, upon receiving the statutory notice, challenge the content thereof (eg, on the ground that penalty charges are imposed) within the statutory period of 21 days prescribed in s. 218(1)(e): *Securicor (M) Sdn. Bhd v. Universal Cars Sdn Bhd* [1985] 1 MLJ 84. It is to be noted that the JD has never challenged the statutory notice in the instant petition.

There has been no attempt by the JD to apply for a stay of the execution of the summary judgment. Notwithstanding the appeal by the JD against the summary judgment, it is axiomatic that such an appeal shall not operate as a stay: O. 55 r. 12 of the Rules of the High Court 1980.

It is incumbent on the JD to prove that the dispute alleged by the JD on the judgment sum is *bona fide*. In *Bank Utama (Malaysia) Bhd v. GKM Amal Bhd* [2000] 2 CLJ 525 Abdul Aziz Mohamad J (now JCA) has the occasion to expound on the meaning of the expression "disputed debt" in the context of a winding-up petition in the following words:

> ... it is a debt in respect of which it is shown, with grounds supported by evidence, that there is a *bona fide* dispute. A debt is not a disputed debt in that context simply because the respondent maintains that he disputes the debt. A judgment on the debt establishes in law that there is no *bona fide* dispute as to the debt. The judgment is good until it is set aside on appeal, and it is enforceable unless a stay has been granted. The fact that the debtor has lodged an appeal against the judgment merely means that he still disputes the debt but does not establish that the debt is *bona fide* disputed. The judgment has already established the contrary.

Abdul Aziz Mohamad J (now JCA) declined to follow the dictum of KL Rekhraj, J in *Solid Kitchen, supra*.

In this connection, I am of the view that the dictum of Abdul Aziz Mohamad, J (now JCA) represents the pragmatic, realistic and better view which I hereby adopt and follow. There is high authority to support the principle that a judgment, be it a judgment in default, summary judgment or a judgment obtained after a full hearing, is nonetheless a good, enforceable and, valid judgment unless and until it is set aside, or execution thereof has been stayed: *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC. A mere notice of appeal against any such judgment cannot alter the validity of the judgment so obtained, save and except where execution thereof has been stayed. In the instant petition, the summary judgment has not been stayed, notwithstanding the appeal filed by the JD against that judgment.

In *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722, the defendant had obtained a default judgment against the plaintiff and when the plaintiff failed to satisfy the judgment sum, the defendant commenced winding-up proceedings against the plaintiff. The plaintiff then applied for an interim injunction to restrain the defendant's winding-up petition. In dismissing the plaintiff's application for injunction, at p. 730 d-g I held, *inter alia*, that the default judgment is binding, adding that:

> The plaintiff herein cannot by way of the present proceedings challenge the validity of the due sum in view of the default judgment. I am of the opinion that the plaintiff is bound by the default judgment which is a valid and regular judgment unless and until it is set aside. The application to set aside should be made to the court in which the default judgment was entered. All views relating thereto must be ventilated there and not in this court by way of a separate and distinct proceedings.
>
> Since the plaintiff is bound by the default judgment, the defendant is entitled to proceed with the winding-up petition based on the default judgment. *YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd (Formerly Known as Matang Factoring Sdn Bhd)* [1996] 3 CLJ 51 CA; *Bank Pembangunan (M) Bhd v. Elgi Marka Sdn Bhd* [1998] 5 MLJ 504. In *Sungei Rinching Sdn Bhd v. Sri Keluarga Sdn Bhd* [1996] 3 CLJ 44 CA, a similar position prevails in respect of a summary judgment.

Recently on 14 November 2002 in the Melaka High Court 29-29-2001 *Hang Chiang Hwa v. Tong Chang Fook*, I held that in bankruptcy proceedings, where a bankruptcy notice has been issued by a judgment-creditor against a judgment-debtor on the basis of a judgment obtained in a sessions court by the judgment creditor against the judgment-debtor, and an appeal against the judgment has been struck out by a judge of the High Court, it is not open to the judgment-debtor to challenge the validity of the judgment in another High Court for the

purpose of obtaining an order to strike out or set aside the bankruptcy notice, as the challenge to that judgment was by way of collateral proceedings, because to do so would allow the judgment-debtor to have a second bite at the proverbial cherry.

By analogy, the challenge which the JD has raised herein against the summary judgment should be raised in the appeal against that summary judgment which shall be heard in due course and not in the winding-up petition herein by way of a collateral proceeding.

In *YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd (Formerly Known As Matang Factoring Sdn Bhd)* [1996] 3 CLJ 51, judgment in default had been obtained against the appellant company. Thereafter the respondent served a notice under s. 218 on the appellant. The appellant did not make any payment as required in the notice. A winding-up petition was filed against the appellant which was wound up. The appellant's appeal was dismissed by the Court of Appeal.

In *Sungei Rinching Sdn Bhd v. Sri Keluarga Sdn Bhd* [1996] 3 CLJ 44 CA, a summary judgment was obtained against the appellant whose appeal to the then Supreme Court had been dismissed. Failure to comply with a s. 218 notice also resulted in the winding-up of the debtor company. (See also *Bank Pembangunan (M) Bhd v. Elgi Marka Sdn Bhd* [1998] 5 MLJ 504 HC; and *SBSK Plantations Sdn Bhd v. Dynasty Rangers (M) Sdn Bhd* [2002] 2 CLJ 329).

JD'S Counterclaim

As the JD's purported counterclaim has to date yet to be filed, it is in my view a bare allegation which is illusory and is therefore irrelevant to the instant petition. It remains both an uncertainty and indeed a mystery whether that counterclaim will see the light or find itself as part of the process or proceeding in court at this juncture. Even if it were to be filed in court eventually, it has to go through the process of litigation before it can eventually graduate into a judgment.

In *BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd* [2001] 1 CLJ 356, the petitioner filed a winding-up petition to wind up the respondent wherein the respondent raised, *inter alia*, a cross-claim or set-off against the petitioner for loss and damage for defective works. The judgment of Jeffrey Tan, J showed that the cross-claim has not been made and still to be litigated or arbitrated at the end of the day, in which case, the learned judge held that this ground could not result in the debt being a disputed debt.

In any event, the counterclaim, if it exists is a separate issue: per Vincent Ng Kim Khoay, J in *Imbangan Utama Sdn Bhd v. Lothan Engineering Works Sdn Bhd* [2002] 3 AMR 2647, 2654; *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 MLJ 157, *Mahkota Technologies Sdn Bhd (dahulunya dikenali sebagai The General Electric Company of Malaysia Sdn Bhd) v. BS Civil Engineering Sdn Bhd* [2000] 7 CLJ 280.

Even if a claim had been filed against a creditor e.g. five months after the service of the statutory notice under s. 218 and three months after the filing of the petition, it was held by Arifin Jaka J in *PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1998] 4 CLJ 437, to be *mala fide* and filed for the purpose of delaying the petition.

A *fortiori,* the position of the JD in the instant petition presents an even more unhelpful and unappealing picture, since there is to date no gestation or germination of such a counterclaim by the JD in the court file.

Where there is evidence of a cross-claim which is yet to be heard and determined, the Court of Appeal in *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 3 CLJ 485, 491 f-g refused to stay the winding-up proceedings based on a consent judgment.

That being the case, I am unable to see any merit in the JD's contention in this respect.

JD'S Solvency

it is an established fact that the JD has not shown any evidence of its solvency, as in addition to the JC, there are the two supporting creditors, thereby cumulatively providing overwhelming evidence of the JD's commercial and actual insolvency: see *Re Hong Huat Realty (M) Sdn Bhd; United Asian Bank Bhd. v. Hong Huat Realty (M) Sdn Bhd* [1987] 2 MLJ 502 HC.

Conclusion

On the grounds which I have adumbrated above, the short and simple answer to the JD's objections is that they are wholly without merits. I therefore allow the JC's petition in encl. (1) and make an order in terms thereof.